

Before the **DOCKET FILE COPY**
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Amendment of the Television Table of
Allotments to Delete Noncommercial
Reservation of Channel *39, 620-626 MHz,
Phoenix, Arizona, and to Add Noncommercial
Reservation on Channel 11, 198-204 MHz,
Holbrook, Arizona

Federal Communications Commission
Office of Secretary

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I. Provision of Spanish language television programming on Cox's Phoenix Cable System.

Cox's cable system serving Phoenix and surrounding areas (the "Phoenix Cable System") offers local viewers a significant amount of Spanish language television programming from a variety of sources.¹ In all, the Phoenix Cable System currently carries twenty-four (24) channels of Spanish language programming. It currently retransmits the signals of three local television stations that broadcast entirely or predominately in Spanish:

- KTVW, a full-power Phoenix television station owned by Univision that broadcasts Univision Network programming;
- KDRX, a Class A Phoenix television station owned by Telemundo that broadcasts Telemundo Network programming; and
- KPBF, a Class A Phoenix television station owned by Una Vez Mas that broadcasts Azteca America Network programming.

In addition, Cox recently entered into an agreement to retransmit the signal of KFTU, a Class A Phoenix television station owned and operated by Univision that broadcasts Telefutura Network programming.

Through a 50/50 joint venture with news and broadcasting powerhouse Belo Communications, Cox co-created *MasArizona*, Arizona's first and only 24-hour Spanish language news and sports channel, and possibly the first such station anywhere in the country. Gauging customer demands, Cox recently co-created and now carries in place of *Mas Arizona*, a locally produced Spanish language channel known as *Mas Notas*, which features music videos and a local news ticker.

In addition to these local Spanish language programming channels, the Phoenix Cable System also carries Univision's Galavision on an analog tier, as well as nineteen (19) other national and international Spanish language programming channels on its "Paquette Latino" digital tier. The

¹ For a complete channel line-up, see www.cox.com/Phoenix/DigitalCable/lineup.asp.

digital channels include Spanish language versions of MTV, VH-1, ESPN, CNN, Toon Disney, Discovery, Fox Sports, History, Bloomberg, and Eternal Word Network. Seven of the Spanish language digital channels carried on Cox's Phoenix Cable System originate from Mexico and Latin America.

II. KPHZ Cable Carriage.

Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission, a commercial television station such as KPHZ is entitled to assert mandatory carriage rights on cable systems located within the station's market.² In nearly all cases, Class A television stations do not qualify for mandatory cable carriage rights.

To Cox's knowledge, the Phoenix Cable System has never carried the signal of KPHZ, which is located approximately 228 miles away in Holbrook. Cox retransmits the signal of Telemundo's Phoenix Class A television station, KDRX-CA, pursuant to a retransmission consent agreement.

If the Commission approves the channel swap proposed in the Joint Petition, and if Telemundo and Daystar implement the channel swap, KPHZ would become a local television station licensed to Phoenix. If KPHZ at that time makes a demand for carriage on the Phoenix system and is otherwise qualified for such carriage, Cox would be required by the must-carry provisions to launch KPHZ.

III. KDTP Cable Carriage.

Different cable carriage requirements apply to commercial and noncommercial educational ("NCE") television stations under Section 615 of the Communications Act and the Commission's rules.³ Although licensed as an NCE television station, KDTP does not satisfy the requirements for cable must-carry as an NCE station. A "qualified" NCE station must be licensed by the Commission as an NCE station, and it must have a licensee that is eligible to receive a community service grant

² 47 U.S.C. § 534; 47 C.F.R. §§ 76.55(b), 76.56(b).

³ 47 U.S.C. § 535; 47 C.F.R. §§ 76.55(a), 76.56(a).

from the Corporation for Public Broadcasting (“CPB”).⁴ Because CPB ceased making new community service grants to television stations in 1995, some six years before KDTP first began service, Daystar is not eligible for a CPB grant for KDTP.⁵ As a result, KDTP is subject to the must-carry provisions governing commercial stations, including the market modification procedures.⁶

The distinction between NCE must-carry and commercial must-carry has little impact on KDTP’s cable must-carry rights in Phoenix, where Cox now carries KDTP’s analog signal. Following approval and implementation of the proposed channel swap, however, KDTP would become a local television station in Holbrook, and its must-carry rights would be subject to the same standards that currently govern KPHZ. In that regard, the Commission’s conclusion in the NPRM that KPHZ and KDTP currently “do not serve ‘substantially the same market’”⁷ confirms that a future Daystar television station in Holbrook, like the current Telemundo television station there, would serve Holbrook rather than Phoenix television viewers and accordingly would not be carried by the Phoenix Cable System.

Congress recognized that “a community within a station’s ADI may be so far removed from the station it cannot be deemed part of the station’s market,”⁸ and consequently authorized the Commission, upon petition, to better reflect those service and market realities by excluding certain communities from a station’s must-carry market. Section 614 of the Communications Act therefore

⁴ See 47 U.S.C. § 535(l)(1)(A)(ii); 47 C.F.R. §76.55(a). Section 76.55(a)(3) provides that the station may be on a reserved or non-reserved channel. See 47 C.F.R. §76.55(a)(3).

⁵ See FCC File No. BLET-20010205ABS; *Frontiersvision Operating Partners, L.P.*, 9 FCC Rcd 9332, ¶¶ 19-20 (Med. Bur. 2002).

⁶ *Frontiersvision Operating Partners, L.P.*, 9 FCC Rcd 9332, ¶¶ 20-27 (finding Daystar affiliate’s Boston area television station to be a “non-qualified” NCE station and deleting cable communities from station’s must-carry market pursuant to Section 614(h) market modification procedures).

⁷ NPRM at ¶ 7.

⁸ H.R. REP. NO. 102-628, at 97 (1992).

specifies that, when considering such market modification requests, the Commission must “afford particular attention to the values of localism.”⁹

Application of the statutory factors to the Holbrook television station confirms that the communities served by the Phoenix Cable System are so far removed from Holbrook that they cannot be deemed to be part of a Holbrook station’s television market. To Cox’s knowledge, no cable system in the Phoenix area has ever voluntarily carried any television stations licensed to communities, such as Holbrook, that are located more than a two hour drive from Phoenix. Due to the 228 mile separation between Phoenix and Holbrook,¹⁰ KDTP would be physically unable to deliver an off-air signal to the communities served by Cox in the Phoenix area. Already, KDTP has no ratings in the Phoenix market, despite its over-the-air service and its carriage on cable and DBS systems. Therefore, the likelihood that KDTP would improve its ratings in Phoenix should it relocate to Holbrook is practically non-existent. In fact, despite Nielsen’s assignment of Holbrook to the Phoenix DMA, KDTP would have no independent nexus to the greater Phoenix area.

The Commission has held repeatedly that the mandatory carriage provisions do not transform “an otherwise local station into a regional ‘super station’ that must be automatically carried in every single community in an ADI.”¹¹ The Commission has applied this principle consistently in numerous

⁹ 47 U.S.C. § 534(h)(1)(c)(ii). In particular, Congress directed the Commission to consider the following factors: “(i) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (ii) whether the television station provides coverage or other local service to such community; (iii) whether any other television station that is eligible to be carried by a cable system in [a] community in fulfillment of the requirements of [the must-carry rules] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and (iv) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.” *Id.* Congress, however, did not intend for these factors to be exclusive, and the Commission may consider other relevant factors. H.R. REP. NO. 102-628 at 97 (1992).

¹⁰ NPRM at ¶ 7.

¹¹ See, e.g., *Amzak Cable Midwest, Inc.*, 13 FCC Rcd 4268, ¶ 15 (Cab. Serv. Bur. 1997).

prior cases involving facts remarkably similar to those that would be presented by a demand for carriage in Phoenix of a television station licensed to Holbrook. In particular, the Commission has:

- DELETED Phoenix and surrounding areas from the market of a station located 150 miles away in Flagstaff.¹² The Univision Telefutura station claimed to broadcast local programming through a translator located in Phoenix.
- DELETED New York City and surrounding areas from the markets of stations located 65 to 80 miles away in Kingston, New York, and Bridgeport, Connecticut.¹³ The Commission found that the stations broadcast “some occasional programming associated with some of the communities in question” through translators in New York City, and the Second Circuit UPHELD the Commission’s determination.
- DELETED Miami, Ft. Lauderdale, and surrounding areas from the markets of two television stations located 125 to 150 miles away in Key West.¹⁴ The stations broadcast Spanish language programming, including local sporting events, through Miami area translators. The Eleventh Circuit UPHELD the Commission’s determination.
- DELETED San Antonio and surrounding areas from the market of a station located 140 miles away in Del Rio.¹⁵ The Spanish language station broadcast a “significant amount” of local programming through a translator located in San Antonio, and it documented demographic and governmental ties between Del Rio and San Antonio. The Commission UPHELD the Bureau’s decision.
- DELETED Albuquerque, Santa Fe, and surrounding areas from the market of a station located 200 miles away in Roswell.¹⁶ The station broadcast a “specialized format” of programming and offered to deliver its signal through a satellite.
- DELETED Denver and surrounding areas from the market of a station located 110 miles away in Steamboat Springs.¹⁷ The Telemundo station broadcast Spanish

¹² *CoxCom, Inc.*, 17 FCC Rcd 17192 (Med. Bur. 2002).

¹³ *Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262 (1997), *aff’d*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

¹⁴ *Continental Cablevision of Jacksonville, Inc.*, 14 FCC Rcd 13783 (FCC 1999) (dismissing stations’ petitions for review of numerous deletion decisions), *pet. for review denied sub nom. WEYS Television Corp. v. FCC*, (11th Cir. Apr. 9, 2001); *Dynamic Cablevision of Florida, Ltd.*, 12 FCC Rcd 9952, ¶12 (FCC 1997) (same).

¹⁵ *KBL Cablesystems of the Southwest, Inc.*, 12 FCC Rcd 21923, ¶¶ 4-7 (Cab. Serv. Bur. 1997), *app’l for review denied*, 16 FCC Rcd 16584 (FCC 2001).

¹⁶ *Comcast Cablevision of New Mexico, Inc.*, 16 FCC Rcd 12440 (Cab. Serv. Bur. 2001) (dismissing station’s petition for reconsideration); *TCI Cablevision of New Mexico, Inc.*, 16 FCC Rcd 3018 (Cab. Serv. Bur. 2001); *TCI Cablevision of New Mexico, Inc.*, 16 FCC Rcd 13959 (Cab. Serv. Bur. 2001).

¹⁷ *TCI Cablevision of Colorado, Inc.*, 11 FCC Rcd 6109 (Cab. Serv. Bur. 1996).

language "statewide and regional news of interest" to an allegedly "underserved" Hispanic population in Denver through a translator located outside Denver, and it maintained its office in Denver.

- DELETED St. Louis and surrounding areas from the market of a station located 75 miles away in Mt. Vernon.¹⁸ The station broadcast a weekly, one-hour public affairs program, local college men's basketball, and other specialized format programming, and it claimed that Nielsen's recent assignment of the station to the St. Louis DMA established a market nexus.

This long and unbroken line of precedent confirms that the Phoenix Cable System serves communities that are not properly deemed a part of the must-carry market of a Holbrook television station. Consequently, should Telemundo and Daystar implement the proposed channel swap, KDTP effectively would trade its must-carry rights on the Phoenix Cable System for must-carry rights on the cable systems serving Holbrook and nearby communities.

Conclusion

The NPRM raises a number of complex legal and policy questions that other interested parties can address in full. By these Comments, Cox seeks only to respond to the limited factual questions regarding cable carriage that may inform the Commission's evaluation of those issues.

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¹⁸ *Charter Communications Entertainment I, L.P.*, 12 FCC Rcd 12173 (Cab. Serv. Bur. 1997) (dismissing petition for reconsideration concerning St. Louis area communities).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments were transmitted via electronic mail on this 15th day of October 2004 to the following:

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